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THE FEDERAL COMMUNICATIONS COMMISSION'S CABLE ACCESS RULE AND THE FICTION OF PUBLIC PARTICIPATION†

Allen S. Hammond, IV*

INTRODUCTION

The purpose of this article is to consider how public participation and program diversity in Cable television [hereinafter Cable or CATV] might best be furthered in view of the economic realities facing the Cable industry. The scope and focus of publicly exercised discretionary and economic regulatory power over the televised communications media is examined. A determination is made as to the extent of the necessity for the public to resort to legal and political means to assure the receipt of its new economic regulatory influence. The article concludes that the Federal Communications Commission [hereinafter FCC or the Commission] should eliminate its restrictions that place Cable in an inferior competitive position vis a vis broadcast television. This would have been preferable to a rollback of the 1977 deadline by which Cable systems operating prior to March 2, 1972 in major markets were to provide increased public access and diversity in programming.

THE STATE OF THE CABLE MARKET

Cable Television (Cable)¹ has been heralded by many as the technology that will alleviate the present lack of diversity in program content on broadcast

† *Author's Note:* Since the time at which this comment was accepted for publication, the Federal Communications Commission has changed its rules governing the provision of access channels by CATV systems. The new rules further emaciate the access channel requirements by: (1) exempting all CATV systems with less than 3,500 subscribers from compliance, although many of these systems are in the major television markets; (2) providing that CATV systems with 3,500 or more subscribers need only comply with the rules to the extent of their "activated capacity"; (3) providing that the cable systems with 3,500 or more subscribers need furnish only one shared access channel (i.e. one on which public, education, local government, and lease access activities are jointly shared), rather than one channel for each of the access purposes. (See Appendix, *Report and Order Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251*, §§ 76.254(a)-(c), F.C.C. Report 76-313, Docket 20508 (1976))

The substitution of section 76.254(a)-(c) for the former sections 76.251 and 76.253 further undermines the facilitation and protection of the public's limited televised freedom of expression first envisioned by the access rules. The F.C.C., rather than making a substantive reduction in the restrictions protecting the broadcast industry, has chosen instead to further compromise the public's interest in televised freedom of expression by allowing even greater discretion in the cable operators' economically motivated judgments.

Editor's Note: Although the question addressed by the author in this article has been resolved, this article is presented for its value in tracing the growth of the Cable television industry and its effect on the public.

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1. "CATV operations are of two types, off-the-air and microwave. Off-the-air systems capture television and radio signals off the air by means of a high antenna convert or modify the signal by electronic equipment and carry the converted signal to subscribers for a fee by coaxial cable and wire. Microwave systems use amplifying devices to bring distant signals over the air to the receiving end of its station from which it conveys the signals to customers in the same manner as off-the-air systems." *Midwest Video Corp. v. United States*, 441 F.2d 1322, 1324 (8th Cir. 1971), *rev'd*, 406 U.S. 649 (1972). See THE CABINET COMMITTEE ON CABLE COMMUNICATIONS, REPORT TO THE PRESIDENT, (1974).

television.² This increased diversity is made possible by Cable technology's ability to provide a greater number of channels over which to transmit programming than can be provided by over-the-air broadcasting. The technology's potential for increasing diversity holds the promise of restructuring the present balance of power between the citizen's right to an "uninhibited market place of ideas,"³ and the broadcaster's rights of freedom of speech and press.⁴ This would occur because the power of discretion concerning who will be able to communicate would be distributed among not only the broadcasters, but also the public via access and "common carrier" channels, and the cable operators via local origination.⁵

Cable technology's potential for increasing diversity also holds the promise of supplying the program consuming public with a wider variety of program options and types.⁶ Its ability to respond to specialized demands makes it a viable medium for the expression of subcultural beliefs and values as well as specialized tastes. Further, the technology has the potential to extend to the viewing public the power of economic preference over the types and content of programming. As a result, the legal and political pressure placed upon the broadcast fiduciaries' choice of programming would decrease. Economic preferences for programming would be shared between the consuming public and advertisers, and the broadcast fiduciaries would find it necessary to compete with the Cable system operator for viewers and advertisers.⁷ Several variables will have a crucial impact upon the ultimate ability of Cable technology to aid in the shift of editorial discretion and economic preference to the public. The most important variable is the present and future state of the Cable market. Other variables have an impact on the state of the

2. While there is a general presumption that viewers value additional viewing alternatives because of their differences in viewing preferences, present studies are inconclusive. See NOLL, PECK AND MCGOWAN, *ECONOMIC ASPECTS OF TELEVISION REGULATION*, 49-53 (1973); Besen and Mitchell, *Noll, Peck and McGowan's Economic Aspects of Television Regulation*, BELL J. OF ECON. AND MGT. SCI. 301, 302-306 (1974).

3. Throughout the text "citizen" or "citizens" and the "public" are used to denote the same group. The group is defined as the general consumers of the televised communication services provided by broadcast and cablecast television. It is also defined as the general public of communicators, any individual member of which would be viewed as having a First Amendment right to freedom of speech. But see the definition of the "public's interest" set forth in E. KRASNOW & L. LONGLEY, *THE POLITICS OF BROADCAST REGULATION*, 16 (1973).

4. See *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367 (1969).

5. "... Congress intended to permit private broadcasting to develop with widest journalistic freedom consistent with its public obligations." *Columbia Broadcasting v. Democratic Committee*, 412 U.S. 94, 110 (1973). "Since it is physically impossible to provide time for all viewpoints, however, the right to exercise editorial judgment was granted to the broadcaster . . . although (his discretion in fulfilling the fairness doctrine obligations) is bounded by rules designed to assure that the public interest in fairness is furthered . . ." *Id.* at 111. Under section 76.251(a)(4) and (7) of the Federal Communications Commission's Rules and Regulations, the public is allowed the right of limited televised expression via the use of designated access and lease cable channels. 36 F.C.C. 2d 143, 240-241 (1972). State and local governments have been extended the option of requiring cablecasters to originate programming. The requirement must be consistent with the federal rules as to origination cablecasting, however. See section 76.201, *et. seq.*, 36 F.C.C. 2d 141, 236 (1972), and the Commission's REPORT AND ORDER RELATIVE TO PROGRAM ORIENTATION BY CABLE TELEVISION SYSTEMS, 49 F.C.C. 2d 1090 (1974).

6. See NOLL, *et. al.*, *supra* note 2 at 49-53.

7. Cable, by offering more viewing alternatives to a relatively fixed number of viewers can fragment the mass audience of a broadcaster. Should cable be allowed to significantly penetrate the top 100 markets and cause the predicted audience fractionalization, audience specialization could cause competition between broadcasters and cablecasters for advertisers interested in specialized audiences.

Cable market. They are: (1) the Commission's elimination of its mandatory origination requirement, formerly section 76.201 of its 1972 Cable rules and (2) the present scope of the Commission's access channel and equipment rules (sections 76.251 and 76.253, respectively).

The present state of the Cable market is in large measure the result of the 1971 Consensus Agreement. The Agreement developed as a result of the conflict between broadcast and copyright interests, on the one hand, and cable interests, on the other, over the importation of distant television signals. At the time of the Agreement, broadcasters and copyright holders threatened to use political influence to block any Cable rules that permitted the importation of distant signals until copyright legislation was adopted. The Cable owners refused to support copyright legislation until the Cable rules were adopted. Meanwhile, the Senate Copyright Subcommittee refused to pass a revision of the copyright laws until the question of Cable was settled. As a result, the entire regulatory process ground to a halt. In response, the FCC issued a letter of intent. The commission proposed, among other things, that Cable systems in the top 100 television markets be allowed to import two distant signals. Urban Cable systems were required to provide a minimum of 20 channels. For each commercial television signal carried, the Cable systems were to provide a channel for the transmission of other types of programming. Specifically, Cable systems were required to provide a public access channel available without cost to noncommercial users, a local government channel, an educational access channel, and, at the Cable owners' discretion, lease channels. The Cable systems were required to ensure that sufficient channels were available to meet all reasonable demands, and some form of two-way communications capacity was required.

The Commission's proposed rules were attacked by the broadcasters who felt that the importation of two signals was unjustified competition. In reaction against the FCC they turned to the White House. President Nixon created the Office of Telecommunications Policy to review the same problems the FCC had studied for a year before issuing its proposed rules. At this time, however, both the broadcasters and the Cable interest were cognizant of the fact that if they did not accept a compromise, the entire matter would be turned over to Congress for legislative resolution, the outcome of which could not be predicted. As a result, both sides agreed to accept a plan which followed the Commission's distant signals proposal in large measure. However, the broadcasters were given more power to prevent or postpone the Cablecasting of certain programming to which broadcasters had purchased the exclusive rights. The compromise agreement was then sent back to the FCC for action and the promulgation of rules.

On February 3, 1972, the FCC issued the Cable Television Report and Order Reconsideration [hereinafter referred to as the 1972 Cable Rules].⁸ The Rules included the distant signal and channel provisions proposed by the Commission and the 1971 Consensus Agreement sponsored by the Office of Telecommunications Policy. The influence of the 1971 Consensus Agreement on the 1972 Cable Rules has negatively affected the Cable market. Serious questions have been raised about Cable technology's ability to deliver the promised benefits to the

8. 47 C.F.R. § 76.251, *removed*, 36 F.C.C. 2d 1, at 240-241 (1972), and 47 C.F.R. § 76.253, *removed*, 49 F.C.C. 2d 1090 (1974); *see generally*, the address by J. Clay Smith, Jr., Deputy Chief of the Cable Bureau, Federal Communications Commission, to the Mass Communications Conference at Virginia Commonwealth University, February 7, 1975.

public. At present, Cable has been incapable of significantly penetrating the top 100 television markets.⁹ Only approximately ten percent of the nation has been wired for Cable reception.¹⁰ While there are forecasts that the Cable industry will continue to grow, the growth will occur at a much more modest rate.¹¹ And, although the forecasters predict that construction of new Cable systems will occur, no significant construction has been forecast for the core cities of the top 100 markets.¹²

The present state of the Cable market and future changes in the condition of the market will largely determine the extent of the "increase" in discretionary and economic power to regulate the televised communications media, and who the recipients of the power will be. Further, the rate of growth of the Cable industry will determine how soon the regulatory power will be received.

The Commission is presently faced with the dilemma of how to promote the Cable industry's growth. It has two basic options. The Commission can issue new rules removing the present restrictions placed upon the Cable industry by the 1971 Consensus Agreement, or it can continue to protect the broadcast industry. The removal of the restrictions will allow citizens and consumers to reap the benefits of Cable technology. The continuance of the present protectionist policy exemplified by the roll back of the 1977 compliance deadline, requires that the public forego for the present, if not permanently, the diversity of media and ideas promised by Cable as the erosion of the public interest oriented rules promulgated by the Commission continues.

Public Interest in Cable

The public's interest in Cable is both legal and economic. The legal interest has as its foundation the First Amendment premise that there be an "uninhibited market place of ideas in which truth will ultimately prevail . . ."¹³ This premise is the embodiment of the fundamental principle that each individual has a right to freedom of expression and that "right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection."¹⁴ It has its basis the presumption that the print media and the spoken word are available to almost everyone and that, as a result, "one person's newspaper, book . . . pamphlet (or words) can be confronted by that of another."¹⁵

No comparable right to broadcast exists because "there are substantially more individuals who want to broadcast than there are frequencies to allocate . . ."¹⁶ Hence " . . . it is idle to posit an unabridgeable First Amendment right

9. LE DUC, CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL 5 (1973).

10. *Id.*, at 5; see also NOLL *et. al.*, *supra* note 2 at 151.

11. CABLECAST, no. 122, Dec. 5, 1974 at 4.

12. Cable penetration in the core cities of the top 100 markets appears to still be limited to those areas having "above average demand" due to peculiar difficulties with standard broadcast reception. HIMSWORTH, CABLE TELEVISION PROSPECTS FOR SOUND AND PROFITABLE GROWTH, A stock research report for Salomon Brothers brokerage firm, July 1, 1974 at 1. Comonor and Mitchell, *Cable Television and the Impact of Regulation*, BELL J. OF ECON. AND MGT. SCI., 196 (1971). Rolla Park, *Prospects for Cable in the 100 Largest Television Markets*, RAND CORP., R-875-MF, 2 (Oct. 1971).

13. *Red Lion v. F.C.C.*, 395 U.S. 367, 390 (1969).

14. *United States v. Associated Press*, 52 F. Supp. 362 (D.C.N.Y. 1943), *aff'd* 326 U.S. 1 (1944), *rehearing denied* 326 U.S. 802 (1944).

15. SLOAN COMMISSION ON CABLE COMMUNICATIONS: THE TELEVISION OF ABUNDANCE 92 (1971).

16. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. at 388.

to Pbor- broadcast . . .¹⁷ Instead, the broadcast licensee acts as public trustee of the communications resource, and has the duty of "fairly informing the listening and viewing public."¹⁸

On the other hand the cost of entry into the broadcast market via ownership of a television station or the production of competitive programming is prohibitive.¹⁹ Thus, the citizen as communicator is effectively barred from exercising his freedom of expression through the ownership of broadcast facilities or the production of programming. And his attempts to exercise his rights through the existing structure are subject to the editorial discretion of the broadcast fiduciary.²⁰

17. *Id.*

18. *Columbia Broadcasting v. Democratic Committee*, 412 U.S. 94, 112 (1973). Broadcast television continues to receive pressure from citizen's groups seeking increased public access to and regulation of the airways. *Broadcasters Give In to Citizens' Demands on Program Content*, Wall Street Journal, Jan. 2, 1975, at 1, col. 1; See *Columbia Broadcasting*, *supra*; while attempts have been made to undermine the present scope of the bargaining power citizens groups enjoy as a result of the license renewal process, they have not been too successful. The most recent setback occurred when the 93rd Congress adjourned without passing the Broadcast License Renewal Bill of 1974. See *Office of Communication of the United Church of Christ v. FCC*, 465 F.2d 519 (1972). Newsletter from "Citizens Information Project," regarding the License Renewal Bill, Dec. 20, 1974. Washington, *Toward Community Ownership of Cable Television*, 83 YALE L.J., n.1 at 1708 (1974).

Television is favored by the general public as the most credible media source of information, as well as the principal information source for general, world, and political news. To the extent that this credibility as a source of information extends information on the values and mores of society, and to the degree that individuals in society use television as a problem solving mechanism for resolving conflicts concerning the social behavior to be pursued, television performs socialization functions for the society.

Studies have indicated that both the middle and lower classes of American society depend on television for news, entertainment, and information about the outside world. Findings suggest that for lower class Blacks, television is the preferred and almost exclusive source of data about the outside world. Research conducted with teenagers and elementary school children further disclosed a tendency within the lower classes to view television as a "school-of-life" device with greater frequency than their middle income counterparts. Lower income elementary and teenage Blacks were found most likely to view television as a true source of information about the outside world, and more likely to use television as a problem solving mechanism for selecting social behavior. The social isolation of low income Blacks was put forth as a possible explanation although not supported by research at this time. See GREENBERG & DERVIN, *MASS MEDIA AND THE POOR*, 74-115 (1970). Balanced against the use by the middle classes and especially the lower classes of television as a "school-of-life" device are the studies of the content analysis of television offerings. Analysis disclosed that the television world is "exaggerated and emphasizes the values and means of white upper-middle class society". Blacks previously shown in roles inferior to whites have recently been more likely to be portrayed as the equal of whites or over-represented in professional or managerial roles. The latter seems to hold also for whites. However, it can be argued that to the degree that the character portrayals still represent the values and means of white upper-middle class society the television world remains exaggerated for Blacks as well as for white. The applicability of the studies of middle and low income children to society-at-large is questionable at best. While documented research is all but nonexistent, opinion and speculation abound. The following speculation on the positive and negative aspects of television's performance as a socialization role should be viewed in this light. See Waltrand Kasserjian, *Blacks as Communicators and Interpreters of Mass Communications*, 50 JOURNALISM QUARTERLY, 291 (1973).

It has been suggested that the media's role as socialization agent would be functional because it could unify society by giving it a broad base of common experiences. The same could be said of television. However, the degree to which the socialization process presents a distorted picture of reality by emphasizing a set of norms and values inconsistent with the life style of most of society should render it dysfunctional. Further, to facilitate the exchange and loss of subcultural variety and creativity for a distorted and unrealistic set of norms and values would seem highly inequitable.

See C. WRIGHT, *MASS COMMUNICATIONS, A SOCIOLOGICAL PERSPECTIVE* 11-23 (1959).

Cable essentially has the potential to offset such a portrayal of the world by allowing for access by others to the means of producing televised communication. Such promise however, is contingent upon cable's ability to do so within the economic, political and legal frameworks presently in existence.

19. MELODY, *CHILDREN'S T.V.* 16 (1973).

20. *Columbia Broadcasting v. Democratic Committee*, 412 U.S. 94, 112 (1973).

Cable can deliver many more channels for transmission than can be technologically and economically be provided by broadcasting facilities.²¹ Once the Cable system is installed and in operation, "the cost of opening up unused channels in the system is very small"²² As a result, transmission costs are much lower than the cost of building and operating a new over-the-air television transmitter.²³ Hence the rate charged to those wishing to communicate would be lower.

The programming standards for Cable need not be uniformly high.²⁴ The medium therefore is well suited to transmit "locally produced, nonprofessional programs which could range from simple talk shows to highly sophisticated documentaries."²⁵ Thus, the citizen communicator need not be held to a program production standard which is competitive with the caliber of programs on broadcast television.

The Market Situation

Many reasons have been given for the industry's recent slow down in growth. Primary blame has been placed upon two factors: the regulatory policies of federal, state, and local government, and the present tight money market.²⁶

There is general agreement that the 1972 Cable Rules have a depressing effect upon Cable's ability to grow. On the one hand, such affirmative requirements as designated access channels and the necessity to provide equipment for origination on designated access and base channels are said to cost Cable operators too much money for the amount of revenue the service draws.²⁷ On the other hand, the restrictive policies of the FCC concerning pay Cable, sports,

21. *Toward Community Ownership of Cable Television*, *supra* note 18 at 1708-09; Smith, *CATV: FCC Rules and the Public Interest*, in COMMUNICATIONS TECHNOLOGY AND SOCIAL POLICY (Gerbner, Gross and Melody, ed.) at 123 (1973).

22. COMMUNICATIONS TECHNOLOGY AND SOCIAL POLICY, *supra* note 21, at 123.

23. *Id.*, at 123.

24. *Toward Community Ownership of Cable Television*, *supra* note 18, at 1709.

25. *Id.* at 1709. Cable technology is not without its negative costs. Cable subscribers must pay for the service. The implications of such a requirement upon the poor who now receive television "free" are obvious. See ECONOMIC ASPECTS OF TELEVISION REGULATION, *supra* note 2, at 23-26. An access requirement that allows the poor to communicate with those who can afford to subscribe but not with others like themselves has serious shortcomings, and will do little to alleviate the present distortion of the world which the poor receive on broadcast television. See note 18 *supra*.

26. Criticism of the Commission's 1972 Cable Rules stems in part from their incorporation of much of the 1971 "consensus agreement." See the letter of Curtis T. White, Director of the Cable Project at the Citizen's Communications Center to Richard E. Wiley, Chairman of the Federal Communications Commission: *Revisiting the 1972 Cable Report and Order*, March 4, 1975. J. Clay Smith, Deputy Chief, Cable Television Bureau, PRIMER ON THE REGULATORY DEVELOPMENT OF CATV, (1940-1972), 38-39 (1974) (citing former Commissioner Nicholas Johnson's statements on the agreement). See also Himsworth, *Cable Television—Prospects for Sound and Profitable Growth*, CABLECAST, no. 114, July 1, 1974, at 1; CABLECAST, *supra* n.11, at 3-4; CABLECAST, no. 110, June 3, 1974; Crandall, *The Profitability of Cable Television Regulation: An Examination of Acquisition Prices*, J. OF BUS., at 3, Oct. 1974. Besen and Mitchell, Noll, Peck and McGowan's *Economic Aspects of Television Regulation*, *supra* note 2 at 311; *Cable Television and the Impact of Regulation*, *supra* note 12 at 196. But see, Page, *CATV/Broadband Communications Systems: Overbuild or Overbuild*, BUS. MGT. AND ENGINEERING, Feb. 1974; THE POLITICS OF BROADCAST REGULATION, *supra* note 3 at 7-9.

27. "Even the already high barriers to entry which capital costs and regulatory burdens raised, I wonder that the Commission could write off as trivial a requirement that ten thousand or so dollars must be invested in unproductive plans. I do not think businessmen would be quite so calm and equitable about this sort of requirement." REPORT AND ORDER, *supra* note 5, at 1111-1113 (Separate Statement of Commissioner Glen O. Robinson in partial concurrence and partial dissent).

feature films and distant signal importation are said to have detracted from Cable's ability to attract subscribers in the top 100 television markets.²⁸

Cable also suffers from its inability to attract investment capital during the present tight money market.²⁹ The credit ratings and decreasing stock values of some Cable companies, and the regulatory problems cited above are said to be responsible for the reduction in the number of lenders which the Cable industry has.³⁰ Other industry analysts have pointed to the inefficient management, marketing and franchise acquisition practices of the Cable industry as the cause of much of the Cable markets' low returns on investment.³¹

Optimistic forecasts of Cable growth cite the construction of new systems in major markets having above average demand, and the beginning of industry's reorientation towards improving its capital budgeting and marketing techniques and the profitability of existing systems as positive indicia of the industry's future growth potential.³² While estimates of final penetration range from 30% to approximately 66% of the top 100 markets, the short term growth rate is predicted to be slow.³³

The current inability of the Cable industry to significantly penetrate the top 100 markets has postponed the public's attainment of the increased televised freedom of expression and consumer based economic control over programming. There can be no shift of editorial discretion as economic preference from the broadcast fiduciary to the public until Cable systems have been build and are in operation.

Section 76.201: Local Origination

The FCC's elimination of the mandatory local origination requirement has caused a serious decrease in the public's ability to assure the existence of the Cable system operator as another source of program diversity.³⁴ The FCC justified the elimination of section 76.201 upon the finding that "the net effect of attempting to require origination (had) been the expenditures of large amounts of money for programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation."³⁵ It found that Cable operator initiated program origination should be based upon the level of consumer demand for the service. The Commission concluded that the goals of increased local expression and program diversity would best be achieved through the less expensive use of access and lease channels by interested citizens, subscribers and operators.³⁶

Cable proponents may have been justified in seeking the elimination of the mandatory origination required under the present market conditions. However, there is a strong probability, although unverifiable, that had Cable been allowed

28. See note 26 *supra* and accompanying text.

29. Himsworth, *supra* note 26, at 1-2; CABLECAST, no. 122, Dec. 5, 1974, *supra* note 26, at 1-3; Page, *supra* note 26, at 44.

30. See note 29 *supra*.

31. Himsworth, *supra* note 26, at 1-2; Page, *supra*, note 26, at 44-45, 49; Crandall, *supra* note 26, at 25.

32. Himsworth, *supra* note 26, at 1; CABLECAST, Nov. 6, 1974, at 2.

33. Himsworth, *supra* note 26, at 1; CABLECAST, *supra* note 29, at 4.

34. REPORT AND ORDER, *supra* note 5.

35. *Id.*, at 18-19, paragraph 33, 49 FCC 2d 1105.

36. *Id.*, at 18-19, paragraph 33-35, 49 FCC 2d 1105.

unrestricted entry, the mandatory origination requirement would not have been a financial burden on the operators.³⁷ Regardless of whether the service would be profitable in its own right, the existence of substantial demand for various sports, movies and distant signal importation programming might have better allowed for the requirement's cablecast services. The absence of these services has more likely than not made untenable a policy which required greater program diversity by the local origination method. While the policy may not have been justified in terms of economic self-sufficiency, it was nevertheless justified as a recognition that the public's interest in increased program diversity should be secured independently of the local Cable operator's decision to provide it based upon his assessment of market demand.

Section 76.251: Public Access

Section 76.251 of the FCC's Cable rules require that many Cable systems designate one Cable channel for public access and one channel for short term lease to the general public.³⁸ The public access channel, which within certain limitations is to be provided free of charge, is to be made available to the public on a first-come, nondiscriminatory basis.³⁹ Cable systems are also required to provide "at least the minimal equipment and facilities necessary for the production and programming for the channel."⁴⁰

Cable access programming, although inexpensive in comparison with the costs of the production of programming for broadcast television, is still expensive. The expense remains despite the availability of equipment.⁴¹ Low income public access users are thus faced with the necessity to limit the scope, format, and duration of their programming in order to avoid prohibitive cost.⁴² Such a restricted format will undermine the quality of the access user's program thereby reducing the program's viewing desirability.⁴³ As a result, the access user's impact is effectively diminished. While subsidization of access channel use with Cable operator revenues presents a method of overcoming the poor quality of low income group programming, there is no requirement in the FCC's Cable rules that a portion of the programming revenues be so used.⁴⁴

The section also limits the number of public access channels which may be provided free of charge. Although the N+1 rule requires that the existence of the appropriate level of consumer demand will trigger the provision of another public access channel, the users of that channel must pay fees for use.⁴⁵ The Commission has also precluded state and local government from increasing the number of "free" access channels provided.⁴⁶ Thus, cost of production and of access remains a significant bar to the exercise of televised freedom of expression.

37. See note 26 and accompanying text.

38. 47 CFR § 76.251(a)(4), (a)(7), *removed*, 36 FCC 2d 1, 240-41 (1972).

39. The production costs of live studio presentations exceeding five minutes are to be charged to the user. 47 CFR § 76.251(a)(O)(ii), *removed*, 36 FCC 2d 143, 241 (1972).

40. 47 CFR § 76.251(a)(4), *supra* note 39, at 101.

41. *Toward Community Ownership of Cable Television*, *supra* note 18.

42. *Id.* at 1713.

43. *Id.*

44. *Id.* at 1712.

45. 47 CFR § 76.251(a)(8), *removed*, 36 FCC 2d 143, (1972) 241; Barnett, *State Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAWYER, 738 (1972).

46. OTP's proposed *Cable Communications Act of 1974* incorporates the Commission's access provisions. It, however, would restrict the number of free access channels to one by congressional act,

The most crucial deficiency in the provision, however, is not the failure to ease the burden of program production costs, but the wide range of discretion residing with the Cable operator. The Cable operator presently has sole responsibility for the "promulgation of specific regulations governing the access channels."⁴⁷ The rules provide only that the channel is to be made available on a first-come, non-discriminatory basis. However:

The decision to be made in regulatory using of the access channels are indeed numerous and difficult. To assert merely that allotment will be non-discriminatory or on a first-come, first-served basis, is in practice to say nothing at all.⁴⁸

The vague prescription of section 76.251 (a) (4) assures that the Cable operator retains a great deal of discretion in his promulgation of regulations governing access and his day to day administration of the access channels.⁴⁹ This follows from the Cable operator's need to accomodate through scheduling the needs of a diverse group of access channel users.⁵⁰

Cable operators are less likely to allow for citizen participation in the decisions made concerning access channel regulation.⁵¹ As a result, citizens have little direct control over the administration of their right to access. Instead, they must rely upon the FCC and the courts to assure the non-arbitrary exercise of discretion by the Cable operator.⁵²

The amount of discretion which the FCC has delegated to the Cable operator is questionable in light of the considerable conflict of interests to which the operator is subject. Should the operator voluntarily originate programming, he will have an interest in maximizing the audience for his programming as opposed to programs which compete with him over leased or access channels.⁵³ More important however, is the fact that the Cable operator is a private entrepreneur whose major aim is maximization of profit. He will thus have an incentive to discourage the use of access channels so that he can lease them to paying customers.⁵⁴ He also has little incentive to encourage local public use of the access channels by a greater number and diversity of users.⁵⁵ "The greater the number and diversity of users, the greater will be the costs of producing programs, the more numerous will be the disputes that arise and the greater will be the overall effort and expense involved in administering the access channels."⁵⁶ Thus, the Cable operator has an incentive to favor users of large segments of time who book far ahead of the date of cablecast.⁵⁷ The Cable operator's interest in profit maximization will also make him less inclined to voluntarily subsidize the public access origination operations.

and preclude any government or its agency from increasing the number of channels. See Sections 708(a); 709(a)(b) and (c)(1); and § 710 of the Federal Communications Commission's 1972 Cable Rules.

47. Federal Communications Commission's 1972 Cable Rules; *Toward Community Ownership of Cable Television*, *supra* note 18 at 1715.

48. *State, Federal, and Local Regulation of Cable Television*, *supra* note 45 at 741, quoting the Sloan Commission's Report *On the Cable*.

49. *Id.* at 740-43.

50. *Id.* at 743.

51. *Id.* at 745-47.

52. *Id.*

53. *Id.* at 745.

54. *Id.*

55. *Id.* at 746.

56. *Id.*

57. *Id.*

Two other areas of possible Cable operator abuse which section 76.251 fails to adequately address are: (1) the possibility for Cable operator censorship of public access programming,⁵⁸ and (2) the growing concentration of ownership of Cable system by large Cable conglomerates.⁵⁹ Cable operator censorship of the content of public access programming blocks the shift of editorial discretion to the citizen communicatory. It thereby frustrates the citizen's realization of his televised freedom of expression and the public's right to a greater diversity of ideas. On another level, the concentration of the ownership of Cable systems in the hands of a few cable companies could block the development of greater program diversity. It was further determined by the Commission that there must be program production and cablecasting equipment available to assure bona fide local expression. As a result the Commission required "all systems serving 3,500 or more subscribers and all conglomerates of commonly owned and technically integrated systems serving, 3,500 or more subscribers to have available equipment for local production and presentation of cablecast programs . . . and permit local non-operator production and presentation of such programs."⁶⁰ The date of compliance was set at January 1, 1976.

Section 76.253: Access Outside The Top 100 Markets

Section 76.253 extends the equipment requirement of section 76.251 (a) (4) to Cable systems and conglomerates which are totally outside the top 100 markets but which serve at least 3,500 subscribers.⁶¹ These Cable systems in all likelihood have neither an origination channel nor access channels. The Commission recognizing the probable absence of the specifically designated channels afforded the system operators "great discretion" in fulfilling the Commission's expectation that (s)he "make every reasonable effort to insure that video access is available to those who seek it."⁶² The Cable operator is required, as under section 76.251 (a) (4), to establish rules requiring first-come non-discriminatory availability of equipment and bandwidth. The rule provides that the charges assessed to the public for the use of this equipment are to be "consistent with the goal of affording the public a low cost means of television access."⁶³ No charge is to be made by the Cable operator for the public's use of the channel time.⁶⁴

Section 76.253 is subject to some of the same infirmities as section 76.251. Its operation is dependent upon the Cable operator's discretion in establishing the rules governing access to the equipment,⁶⁵ the provision of notice to the public that a channel is available for non-commercial public access cable-casting⁶⁶, and the price to be charged for the equipment's use.⁶⁷ While the rule limits the Cable

58. "In spite of FCC rules prohibiting cable operators from censoring what goes on the public access channels some operators appear to be prescreening public access material." *Toward Community Ownership of Cable Television*, *supra* note 18, at 1716.

59. *Id.* at 1716; *The Role of Advocacy in Public Policy Planning*, COMMUNICATIONS TECHNOLOGY AND SOCIAL POLICY *supra* note 21, at 176-77.

60. *Report and Order*, *supra* note 5, para. 35, at 1106.

61. *Id.*

62. *Id.*, para. 40, at 1108.

63. *Id.*, para. 41, at 1108.

64. 47 CFR § 76.253(c).

65. *Id.*

66. *Report and Order*, *supra* note 5, para. 40, at 21.

67. 47 CFR § 76.253(c).

operator's ability to contract out his cablecasting equipment, the circumstances under which, the limitation comes into affect are not defined.⁶⁸

The Cable operator is not required to afford the public a participatory role in the formulation of the rules governing the public access to the equipment. However, the rules must be made available for public inspection.⁶⁹ The Commission has also precluded state or local promulgations of any other rules governing the use of the channel or the manner of its operation for public access cablecasting.⁷⁰

The major problem with the provisions of the rule is that the Cable operator's good faith is all that regulates the probable conflicts between his interest in maximizing profits and the public's interest in access. The Cable operator who has an unused channel will have an interest in leasing it to a commercial customer so that he can charge for both channel time and equipment. If he gives the public notice that the channel is available, the charge for equipment will probably be lower than rates charged to commercial users.

The only instance in which the Cable operator is *required* to select for the public and against the private lessees of cablecasting equipment is where the lease of the equipment to the private lessees would prevent "for a substantial portion of time . . . local programming designed to inform the public on controversial issues of public importance."⁷¹ Just what that type of local programming would entail and who would determine when the programming met the standard was not made clear. Thus the public, while assured of access to cablecasting equipment, may not be able to cablecast because no channels are available at a given time or because the equipment may be on lease. And if it is on lease, the circumstances dictating the public's priority for using the equipment are not made clear. Otherwise, the public's right to cablecast is still subject to modification by cost of production.

The Need For Non-Federal Regulation

The vague nature of the criteria by which access is to be allocated under sections 76.251 and 76.253 and the complicated nature of the allocatory process engendered by the demands of a diverse public allow the Cable operator a considerable amount of discretion. Unfortunately, the rules allow this discretion to go unchecked, for the most part, until a citizen seeks to redress a real or imagined abuse of discretion. However, the nature of the rules make the determination of what constitutes discretionary abuse difficult. That determination presently rests with the FCC and the courts.⁷²

Historically, citizens and consumers have not been able to sustain the effective protection of their interest against the producer absent the creation of a "producer role" to protect that interest.⁷³ The elimination of the mandatory origination requirement has effectively diminished the affirmative "producer role" created for Cable by the 1972 Cable rules. Citizens must now depend upon

68. 47 CFR § 76.253(b)(1).

69. 47 CFR § 76.253(b)(3)(ii).

70. *Id.*

71. 47 CFR § 76.253(b)(1).

72. *State, Federal, and Local Regulation of Cable Television*, *supra* note 45, at 737.

73. Cohn and Cohn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1006 (1970).

the Cable entrepreneur's marketing expertise to determine the "demand" for the provision of origination services. The Commission's decision to make the Cable operator's provision of access and equipment facilities to the public contingent upon the Cable operator's sole discretion as to how and to whom the services are to be provided, has diminished the potential producer role envisioned for Cable. The suitability of the Cable entrepreneur as the arbiter of when a public service should be provided, or how and to whom cablecast equipment should be distributed, is questionable given his interest in profit maximization. This interest will almost inevitably force him into situations where it conflicts with the public's interest in the provision of marginally profitable or unprofitable public services.

Previous shortcomings of the Cable industry to provide services under contract (where its real interest was to secure the franchise), undermines the placing of an unqualified trust in the industry's intentions to pursue the public's interest.⁷⁴ Even if it is granted that the industry's present reorientation towards the improvement of its marketing, management and capital budgeting expertise will ultimately result in the industry's increased growth, there is little reason to believe that this growth and the protection of the public's interest in televised freedom of expression are mutually compatible. Given the present restrictions on Cable's development in the top 100 markets, the requirement that Cable systems provide access channels and production equipment can become another economic bar to entry for a Cable system or render the system less profitable.⁷⁵ Further, there is no assurance that after the systems are built, the provision of access services to the public at a lower rate than that necessary to maximize profits will be viewed any more favorably by investors and lenders than it is now.

The Preclusion of State, Local and Citizen Control Over Access

The FCC has precluded state and local promulgation of rules governing the Cable operator's discretion in providing access and equipment.⁷⁶ Thus, the public is estopped from making operator compliance with the public-authored rules governing operator discretion a condition of the franchise under the public proceeding and franchising mechanism of section 76.31 of the Commission's rules and similar state or local laws.⁷⁷ The Commission has also limited the number of free access channels which may be provided. Again, state and local governments are precluded from requiring more free channels if demand for access increases. As a result, the public cannot increase the numbers of free access channels through the public proceeding and franchising mechanism of section 76.31 and similar state and local rules.⁷⁸

74. *In Oakland, A Cable-TV System Fails to Live Up to Promises*, WALL STREET JOURNAL, Sept. 25, 1974, at 34. Comments filed by the Philadelphia Community Cable Coalition in Docket 20023, Transfers of Control of Cable Television Franchise, at 4.

75. *Report and Order*, *supra* note 27, at 2 (Separate Statement of Commissioner Gen O. Robinson).

76. *State, Federal, and Local Regulation of Cable Television*, *supra* note 45, at 747; similarly, the regulation of the rates to be charged users of access and base channels and production equipment, is a function more akin to that performed by state Public Utilities Commissions, not the FCC. And while the FCC may have public policy reasons for the present pre-emption of state or local regulation of access and lease channels and production equipment, probable consumers' dissatisfaction with the cable operator's administration of the service may force a future move to state regulation. Such a move would be necessitated by the tremendous number of systems which would have to be regulated and the probable inability of a broad rule to adequately address the problems of different areas.

77. Section 76.31 of the Federal Communications Commission's 1972 Cable Rules; 36 FCC 2d 1, 79-80 (1974).

78. *Id.* at 79-80.

The FCC has based its decision to preclude state and local involvement in the promulgation and administration of access and equipment requirements upon three policy grounds. The Commission has determined that: (1) dual regulation in the area of public access channels is impractical, (2) the preclusion of state and local involvement will allow for the perceived need for experimentation and varied experience during the initial period of access development, and (3) state and local involvement in the area of public access channels might have a detrimental effect upon the growth of the Cable industry.

The preemption of state and local authority over public access requirements based upon reasons of impracticality and the perceived need for experimentation has been criticized. It has been argued that dual regulation is inevitable and that the real question is whether the Cable operator alone, or in conjunction with state or local entities, will promulgate and administer the access channels.⁷⁹ The importance of the question of who will have authority over the provision of public access is underscored by the minimal provision for free access and the opportunities for conflicts of interest to arise within the broad scope of discretion residing in the Cable operator.⁸⁰ Further, under the present set of regulatory policies, the variety of experiences to be gained via the experimentation of Cable operators is limited because the Commission, in ruling on appeals of Cable operator discretion can only promulgate broad rules.⁸¹ Broad rules fail to take into account the difference inherent in the various areas in which Cable systems presently exist. They also do not anticipate future differences which may emerge as Cable penetration increases.

It is conceded that the Commission's concern for Cable economic viability justifies the preclusion of state or local regulation of access requirements in existing Cable systems. However, the prohibition against future increases in free or low rate access channels, and experimentation with cost and the caliber of production equipment in new systems has been argued to be unjustified.⁸² It is presumed by this argument that both the Cable and government entities are capable of negotiating with a free hand. Such an argument is bolstered by the forecasts of the Cable industry's reorientation towards viable management, marketing, and capital budgeting techniques.

Past experience and the continued present of the 1972 consensus restrictions belie such a presumption. The situation in Oakland, California, although by no means universal, undermines a belief that local governments are capable of bargaining equally with Cable operators.⁸³ Further support for such a conclusion can be found in the recommendations of the Federal/State-Local Advisory Committee's report to the Commission. And, the past indiscretions and questionable politics of certain local governments with regard to the award and regulation of Cable franchises, have further highlighted current dissatisfaction with local regulation of Cable.

On the other side, the Cable industry is in the process of a reorientation towards techniques which will procure sound, sustained growth. But such a reorientation, which is more a response to investors and lenders than to articulated

79. *State, Federal, and Local Regulation of Cable Television*, *supra* note 45, at 741.

80. *Id.*, at 738.

81. *Id.*, at 744.

82. *Id.*, at 738.

83. *In Oakland, A Cable-TV System Fails to Live Up to Promises*, *supra* note 74.

public interests, gives no guarantee that the interest of the public and those of the industry are synonymous.

Therefore, if the Cable industry and franchisors are to bargain in an "open market", provisions must be made to insure sufficient consumer knowledge of what a particular Cable operator can honestly offer. The provision of such knowledge is believed to the best provided by the states or independent consultants. The tendency of some local franchisors to abuse their discretion must also be curbed. Otherwise, the Commission's preclusion against local regulation of access channels and equipment seems justified not only as a means of protecting the Cable industry, but also as a means of protecting consumers.

Another consideration which must be made regarding "open market" transactions between Cable operators and franchisors is the effect of requiring more free access channels, etc. upon competing franchise applicants. It is possible that the costs of providing increased numbers of access channels and equipment will serve as a economic bar to entry for local firms and not-for-profit organizations. However, the present restriction of the quantity of channels or equipment may not serve to lessen the tendency of franchisors to select larger Cable firms arguably offering lower costs due to economics of scale.

As a consequence of the FCC's preclusion of state and local regulation of public access to Cable channels and equipment, the public is almost totally dependent upon the Cable operator to provide access services. While the Cable operator does not exercise editorial discretion over whose viewpoints will be aired, he does limit access. The number and types of viewpoints is limited by the cablecaster's response to the diversity of demand in terms of cast and time. This response is subject to modification by two factors: (1) the changing public demand for access and (2) the cablecaster's interest in maximizing profits. The great danger in this mode of allocation is that the cablecaster's interest in profit maximization will be exercised under the guise of discretion and will result in a decrease in the access to cablecast televised freedom of expression. Such a result would also reduce the richness of diversity available to the public.

The Limited Mandatory Origination Requirement

The Commission did not, however, preclude state or local governments from requiring cablecasts to originate programming. But they are limited to requiring local origination consistent with the provisions of former section 76.201. The non-federal requirements are still vulnerable to an FCC finding that they unduly burden the development of a cable system.

The allowance of state or local requirements for the local origination of Cable programming expands the "producer role" of the Cable operator. It increases the likelihood that diversity of programming will result. However, it places the cablecaster in direct competition with public access cablecaster programming. And, in light of the current FCC restrictions upon the regulation of the Cable operator's allocation of access facilities, no direct means of modifying the probable effects of the conflicts are available to non-federal regulatory bodies.

CONCLUSION

The public's right to televised freedom of expression is limited at best. Production costs, problems of distribution of scarce time resources, and the

tremendous quantity of discretion residing in the Cable and broadcast operators assure that the right is not unabridged. Cable offers a change for individual televised expression, however, limited. Yet this right remains premised upon the ability of the industry to penetrate the top 100 television markets.

The Commission has struck what it believes to be the best compromise between providing greater local expression and program diversity on the one hand, and allowing the Cable industry to grow within the confines of the 1971 Consensus Agreement.⁸⁴ In order to protect Cable's growth, the FCC has precluded non-federal review of Cable operator discretion in the provision of access channels required by its 1977 rules. The Commission has also limited the impact of non-federal requirements for cablecaster originated programming. By so doing, it has sought to reduce the economic barriers to Cable's entry into the top 100 markets. While it may be concluded that access and origination requirements represent economically taxing burdens upon the Cable industry, the impact of these burdens has been exacerbated by the present national communications policy which protects existing industries against competition from new technologies. The roll-back of the 1977 compliance deadline further undermines the potential diversity of media and diversity of programming which Cable technology can provide. The Commission does have another option. It can instead remove the restrictions of the 1971 consensus agreement concerning the importation of distant signals and the cablecasting of sporting events and new movies. This option allows the industry to grow to the public's benefit, not at its expense.

84. COMMUNICATIONS TECHNOLOGY AND SOCIAL POLICY, *supra* note 21, at 130.